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AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 589

Case No. 645: SHOUSHA

Against: The United Nations Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Samar Sen, Vice-President; Mr. Mikuin Leliel Balanda;

Whereas at the request of Rafik M. Shousha, a recipient of an early retirement benefit from the United Nations Joint Staff Pension Fund, hereinafter referred to as the "Pension Fund", the President of the Tribunal, with the agreement of the Respondent, extended to 27 January 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 13 January 1992, the Applicant filed an application requesting the Tribunal:

"...

3. To rescind the decision adopted by the Standing Committee, acting on behalf of the United Nations Joint Staff Pension Board (Pension Board), at its 172nd meeting, held in Paris on 25 July 1991, to uphold the decision by the Secretary of the Board to apply in respect of the Applicant, from 1 January 1991, the Pension Fund's Adjustment System, which, as amended by United Nations General Assembly resolution 45/242, of 21 December 1990, included a further interim measure that did not protect the Applicant; and to draw all the legal consequences therefrom;

4. Accordingly, to order the Fund to pay the Applicant, with retroactive effect from the date of his separation from service, a pension recalculated on the basis of the system in effect on 31 December 1990, unless it orders the Fund to take such other

pecuniary measures, which are left to the discretion of the Tribunal, in order to compensate the Applicant for his loss (more than 34 per cent) in the amount of his local currency pension;

5. To award the Applicant, as costs, a sum payable by the Respondent, assessed at the time of the filing of this application, at one hundred thousand (100,000) French Francs, subject to adjustment upon completion of the proceedings."

Whereas the Respondent filed his answer on 14 August 1992;

Whereas the Applicant filed written observations on 30 March 1993;

Whereas, on 14 May 1993, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas, on 21 May 1993, Mr. Erik Crone, the recipient of a pension from the Pension Fund, filed a request for intervention in the case and on 1 June 1993, the Respondent submitted his comments thereon. On 9 June 1993, the intervenor provided his comments on the Respondent's submission on the intervention;

Whereas, on 24 May 1993, at the Tribunal's request, the Respondent submitted his comments on the Applicant's written observations, and on 9 June 1993, the Applicant provided his comments thereon;

Whereas the facts in the case are as follows:

The Applicant, born on 23 January 1936, was a staff member of the World Health Organization (WHO), from 7 January 1963, until his separation from service on 31 January 1991, upon the agreed termination of his permanent appointment. He then became entitled to an early retirement benefit, under the Regulations of the Pension Fund, on 1 February 1991.

As the Applicant provided satisfactory proof of his residence in Switzerland after his separation from WHO, his early retirement benefit has, since its inception, been established and adjusted, under the applicable provisions of the "two-track Pension

Adjustment System", adopted by the General Assembly in its resolution 35/215, as subsequently amended.

Under these provisions, the rate of exchange to be used in converting the US dollar amount of the benefit payable to a resident in a country other than the United States of America, is the average of the rates in effect during the 36 consecutive months prior to the participant's separation from service.

Subsequently, in its resolution 42/222, dated 21 December 1987, the General Assembly adopted an "interim floor" measure as part of the Pension Adjustment System for the calculation of the local currency benefit, which applied to pensioners and others residing in certain countries, including Switzerland. This measure was designed to prevent a loss in the value of pension benefits in local currencies, where an overall decline in the 36 months average exchange rate referred to above, occurred during the years 1986 and 1987. It was to be in effect from 1 January 1988 to 31 December 1990. In essence, it established a "floor" for the local currency base amount of the benefits affected, so that they could be no less than the amount established by applying to the dollar base amount the average monthly ratio between the local currency base amount and the dollar base amount during 1987.

The measure applied to participants who separated from or died in service during 1988, 1989 or 1990 and to their survivors, except to deferred retirement benefits and benefits derived therefrom. It was intended to dissuade staff members from taking early retirements for the purpose of avoiding losses in their future local currency pension, arising from a further devaluation of the US dollar in relation to the local currency of the country of their residence.

As the Applicant separated from service after 31 December 1990, the interim floor measure did not apply to him.

With effect from 1 January 1991, i.e. after the expiration of the interim measure, the General Assembly, in its resolution 45/242, dated 21 December 1990, introduced a "transitional measure" under which participants aged 55 or over on 31 December 1990, who

separated between 1 January 1991 and 31 March 1992, would become entitled to an amount in local currency no smaller than that to which they would have become entitled had they separated on 31 December 1990, at the age and with the final average remuneration and contributory service they had on that date.

The Applicant acknowledged that the "transitional measure", which by its terms, was limited to those who reached age 55 on or before 31 December 1990, did not include him, as he reached age 55 only on 23 January 1991. However, in a letter dated 27 January 1991, to the Secretary of the Pension Fund, he expressed the hope that "cases like mine could be considered with a view to applying these measures retroactively" and that "the few cases that fall between two stools would not be forgotten."

In his reply of 4 April 1991, the Secretary of the Fund confirmed that the Applicant fell outside the scope of the "transitional measure" and that only the General Assembly, which had adopted the Pension Adjustment System, had the authority to modify its provisions.

In a letter dated 5 June 1991, the Applicant lodged an appeal with the Standing Committee of the Pension Board against the refusal by the Secretary of the Board "to apply the 'floor rate' as approved by the United Nations General Assembly in its resolution 42/222 dated 21 December 1987, to determine the local currency base amount of my pension."

The Standing Committee of the Board, at its 172nd meeting held on 25 July 1991, upheld the decision taken by the Secretary of the Board in the Applicant's case. In a letter dated 14 August 1991, the Secretary of the Board informed the Applicant of the Standing Committee's decision, as follows:

> "Please be advised that, at its above meeting, the Standing Committee considered whether the transitional measure set out in paragraph 37 of the UNJSPF Pension Adjustment System was implemented properly by the Secretary of the Board and then applied correctly in you case when the initial Swiss local-currency track amount of your early retirement

benefit was determined. The Standing Committee decided to uphold the decision taken by the Secretary of the Board in your case, on the grounds that the Secretary was constrained to apply the provisions of the UNJSPF Pension Adjustment System as adopted by the UN General Assembly, including its recent amendment through General Assembly resolution 45/242, under which you were not entitled to the transitional measure.

While agreeing that the Secretary of the Board had no option but to apply the decision of the General Assembly - which had been based on a recommendation of the Pension Board - as to the limited scope of application of the transitional measure, several representatives of participants on the Pension Board noted their reservations as to the legality of the Assembly's decision."

On 13 January 1992, the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contention is that:

The Respondent's decision violated the Applicant's rights, in that it misconstrued the Pension Fund's obligation to avoid arbitrary modifications in its Pension Adjustment System.

Whereas the Respondent's principal contention is that:

The Applicant's rights were not violated by any arbitrary action modifying the Pension Fund's Adjustment System.

The Tribunal, having deliberated from 10 June to 23 June 1993, now pronounces the following judgement:

I. The Applicant challenges the validity of a decision dated 25 July 1991, by the Standing Committee, acting on behalf of the United Nations Joint Staff Pension Board (Board) of the UN Joint Staff Pension Fund ("Pension Fund"), to uphold a decision of the Board's Secretary to apply in respect of the Applicant from 1 January 1991, the Pension Adjustment System, as amended by UN General Assembly resolution 45/242, dated 21 December 1990. The

basis of the Applicant's contention is his claim that a transitional measure adopted by the General Assembly through its resolution 45/242 was arbitrary, inasmuch as it failed to include within its purview him and others who reached the age of 55 after 31 December 1990. In essence, the Applicant questions the validity of the General Assembly's action in limiting the transitional measure to staff members who had attained age 55 before 1 January 1991. He recognizes, however, that the Standing Committee applied, quite faithfully in accordance with its terms, the transitional measure established by General Assembly resolution 45/242.

II. That transitional measure was adopted about a year before a long-term modification of the Pension Adjustment System by the General Assembly in 1991. It was adopted in recognition of the impending expiration, on 31 December 1990, of an earlier interim measure, adopted by the General Assembly, which related to the years 1988, 1989 and 1990. The 1988-90 interim measure provided for a "floor ratio" as part of the Pension Adjustment System. Its purpose was to ameliorate, in part, the adverse effects on pension entitlements of staff members whose pensionable remuneration had been reduced and/or frozen and who were retiring in certain countries with a high cost-of-living, of the steady appreciation of the local currency in relation to the US dollar. These factors gave an incentive to staff members to take early retirement if they were planning to retire in those countries. The decline in the value of the dollar, together with reduced and/or frozen pensionable remuneration, meant that, under the pre-1988 Pension Adjustment System, staff members eligible for early retirement who remained in service until their normal retirement date would receive a lower pension in local currency than on early retirement.

III. The Tribunal notes that when the General Assembly established the 1988-90 "floor ratio", one of its purposes was to

lessen or remove this incentive for early retirement. The interim nature of the measure was made clear. The General Assembly also specifically provided that no acquired rights were being created by the measure and that the Pension Adjustment System was to be studied further to seek a longer term solution to the problems which the interim measure had intended to alleviate.

IV. Even before the 1988-90 interim measure, the problems of inflation and currency fluctuation in connection with the calculation of pension benefits had been considered by the General Assembly. Measures had been taken to lessen the fortuitous impact of relative currency values in the month preceding retirement, in calculating the local currency track pension figure under the two-track Pension Adjustment System. Indeed, although the amount of the Applicant's pension was not affected by the 1988-90 interim measure, he did receive the benefit of a pension adjustment feature dealing with that problem, in accordance with the so-called "Washington formula" adopted by the General Assembly in resolution 32/215, effective 1 January 1981.

V. At the time the General Assembly adopted the transitional measure in 1990, it had the benefit of substantial exploration and discussion of the subject by the Board which by consensus, had favoured the measure adopted by the General Assembly as against other options that were considered. Paragraph 114 of the Board's report to the General Assembly in 1990, which was cited in the resolution adopting the transitional measure, stated:

> "Noting that the interim floor measure would expire on 31 December 1990 as stipulated in General Assembly resolution 42/222, the Board, after extensive negotiations, agreed by consensus:

(a) that there was need for a transitional measure which would be applicable to a specific group of participants (...) for a limited period;

(b) That the measure should, in no case, be construed as constituting a precedent, nor give rise to an expectation of extension for a further period, whether or not agreement was reached on a longer-term modification of the Pension Adjustment System;

(c) That this measure should therefore not constitute an acquired right for participants who either retire or choose early retirement after the expiration date of the transitional measure;

(d) On this basis, to recommend to the General Assembly the establishment of personal 'floor' amounts for the initial local currency pensions of participants in the Professional and higher categories, corresponding to the initial local currency they would have received had they separated on 31 December 1990, on the understanding that such 'floor' amount would be applicable only to participants qualified for a retirement or early retirement benefit on 31 December 1990 who separate on or before 31 March 1992.

This measure, if approved by the General Assembly, would be incorporated into the Pension Adjustment System as described in annex V."

VI. The General Assembly was obviously aware that between 1988 and 1990, staff members eligible for early retirement, i.e., having reached the age of 55 before 31 December 1990, might, in reliance on the 1988-90 interim measure, have decided against taking early retirement. For such persons, the General Assembly decided, through the transitional measure, to provide a limited opportunity to take early retirement after 31 December 1990 and still benefit from the 1988-90 "floor ratio" interim measure. This transitional provision was to remain in effect for a 15-month period until 31 March 1992. It was contemplated that, thereafter, a long-term modification of the Pension Adjustment System would be introduced. Doubtless, cost considerations were also taken into account by the General Assembly in 1990, when it adopted the transitional measure.

VII. The Tribunal notes that the General Assembly saw no need to extend the benefit of the 1988-90 transitional measure to those who would become eligible for early retirement after 31 December 1990. As the Respondent has noted, one reason for this was that, between 1988 and 1990, pensionable remuneration had been unfrozen and had been increasing. Although, as the Applicant points out, this was true for all staff members, the fact remains that the level of pensionable remuneration was an element which entered into the adoption of the 1988-1990 transitional measure to deal with the problem of longer service resulting in a lower pension benefit. This element continued to have significance with regard to the phasing-out of the transitional measure. The Tribunal finds therefore, that it was not irrelevant, as claimed by the Applicant; it was germane to the General Assembly's willingness to retain the "Washington formula" pending a long-term modification of the adjustment system in respect of those not covered by the transitional measure.

VIII. If the General Assembly had extended the duration of the 1988-90 interim measure for a wider group of staff, it would have re-created the undesirable incentive, which might not otherwise have existed, for the early retirements of persons who first became eligible for early retirement after 31 December 1990. Staff members who first became eligible for early retirement between 1 January 1991 and 31 March 1992, might have found the 1988-90 interim measure sufficiently attractive to justify early retirement before 1 April 1992. However, one of the elements of the pre-1988 incentive to take early retirement in the light of the currency fluctuations in high cost-of-living countries had changed significantly, as noted in the preceding paragraph. Moreover, the basic problem was expected to be addressed by a long-term modification of the Pension Adjustment System. In the circumstances, the General Assembly, had a reasonable basis for assuming that persons becoming eligible for early retirement

between 1 January 1991 and 1 April 1992, who were dissatisfied with the pension adjustment system applicable to them under the "Washington formula" would have an incentive to remain in service until at least the effective date of the anticipated long-term modification.

IX. The Tribunal considers, therefore, that the scheme adopted by the General Assembly in 1990, can hardly be characterized as arbitrary. It was intended to lessen, if not eliminate the incentive for early retirement provided by the currency fluctuation problem, while at the same time protecting for a limited period, staff who, but for the 1988-90 interim measure, might have opted for early retirement before 1 January 1991. The transitional measure adopted by the General Assembly with respect to the period 1 January 1991 through 31 March 1992, which was limited to staff who had been eligible to avail themselves of the interim measure through early retirement before 1 January 1991, had, in the Tribunal's view, a wholly rational basis.

X. The Applicant, however, maintains that, because he reached the age of 55 on 23 January 1991, only 23 days after the expiration of the 1988-90 interim measure, the General Assembly acted arbitrarily in not continuing the 1988-90 interim measure for the benefit of persons like himself, who reached the age of 55 after 1 January 1991, but before 1 April 1992, and who wished to take early retirement. In effect, the Applicant would have the Tribunal treat him as though he had an acquired right to the benefit of the 1988-90 interim measure when he reached the age of 55, despite the explicit language of the General Assembly resolution that no acquired rights were created by it.

XI. The Tribunal recalls Judgement No. 514, Maneck (1991), para. IV, in which, in rejecting the application, it said :

> "... the Tribunal is not empowered to rewrite existing regulations or to create new regulations for the Pension Fund. That is the function of the General Assembly. To the extent that the Applicant seeks such relief from the Tribunal on grounds deemed by him to be equitable in nature, it is plain that his application must fail. The Tribunal likewise has no authority to extend to the Applicant an interim measure adopted by the General Assembly which simply does not apply to him. This again is a matter for the General Assembly's legislative authority."

The Tribunal notes that in Maneck, the Applicant also sought to have the Tribunal apply to him the "floor ratio" under the 1988-90 interim measure even though his circumstances did not come within its terms.

XII. The Tribunal also recalls its words in Judgement No. 546, Christy, et al. (1991), para. XIV, that:

> "It is within the province of the General Assembly, following advice of the International Civil Service Commission, the Board and others, to make reasoned judgements with regard to the Pension Adjustment System ... It is not for this Tribunal to attempt to evaluate the complex considerations involved in making determinations as to comparable income replacement ratios, or the effect on comparable pensions of changes in the United States tax laws, or similar matters. These are properly matters for the General Assembly's judgement. And it is surely not within the competence of this Tribunal to substitute its judgment for that of the General Assembly with respect to matters of that nature."

XIII. Finally, the Tribunal recalls its Judgment No. 524, Stein (1991), paras. VIII and IX, in which the Tribunal declined to find arbitrariness in the cut-off dates of a transitional pension calculation measure adopted by the General Assembly, as it found that a rational basis existed for the General Assembly's action. The Tribunal also noted that "... Any transitional arrangement invariably results in some who benefit and some who do not..."

XIV. The Tribunal has pointed out above that it sees an entirely rational basis for the transitional measure adopted by the General Assembly in 1990, in anticipation of its 1991 long-term modification of the Pension Adjustment System (which became effective on 1 April 1992). That the General Assembly was satisfied temporarily with continuation of the "Washington formula" and did not wish to encourage, or incur higher costs for, early retirements by staff members like the Applicant, who reached the age of 55 after 1 January 1991, cannot be considered unlawful by any criterion. It was open to the General Assembly to be far less concerned with the possibility of excessive early retirements after 1 January 1991, while at the same time, declining to encourage them. For all of the above reasons, the Tribunal sees no conflict whatever between the inapplicability of the 1990 transitional measure to the Applicant and the governing principles as to modifications in the Pension Adjustment System. (Cf. Judgement No. 546, Christy, et al. (1991), para. XIII; Judgement No. 378, Bohn, et al. (1986), para. XXXI; Judgement No. 379, Gilbert, et al. (1986), para. XXX.)

XV. The Tribunal notes that the Applicant decided, for entirely personal reasons, to take early retirement in 1991, despite the fact that he could have remained in service until 1 April 1992, or longer. His decision was apparently based in large part on his desire to maintain his residential status in Switzerland rather than jeopardize it by the possibility of transfer to another country, had he remained in service. It is not for the Tribunal to comment upon the merit of such a personal decision by a staff member. Any adverse consequences of such a personal decision cannot affect the validity of any reasonable action by the General Assembly. It is always up to the staff member to balance the advantages and disadvantages of a personal decision before making it. The Applicant was in a position to do so, and presumably he did.

XVI. For the foregoing reasons, the application is rejected, as is the request for costs.

XVII. An application for intervention, advancing the same contentions as those described above, has been submitted by Mr. Erik R. Crone, an FAO staff member who, like the Applicant, Mr. Shousha, reached the age of 55 after 1 January 1991, and took early retirement before 1 April 1992. The application for intervention is admitted and rejected for the reasons set forth above, as is the request for costs.

(Signatures)

Jerome ACKERMAN
President

Samar SEN
Vice-President

Mikuin Leliel BALANDA
Member

Geneva, 23 June 1993

R. Maria VICIEN-MILBURN
Executive Secretary